Supreme Court of the United States

October Term, 1920. No. 318.

MAX HENKEL,

Plaintiff-Appellant,

against

THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States of America,

Defendants-Appellees.

BRIEF FOR APPELLANT.

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Supreme Court of the United States

MAX HENKELS, Plaintiff-Appellant, against THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States of America, Defendants-Appellees.	October Term, 1925. No. 318.

BRIEF FOR APPELLANT.

APPEAL FROM JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT FILED JANUARY 12, 1925, AFFIRMING DECREE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED MAY 23, 1924, DISMISSING THE APPLICATION OF THE PLAINTIFF IN A SUIT UNDER THE TRADING WITH THE ENEMY ACT.

Reported Below.

In the District Court: 298 Fed. 947.
In the Circuit Court of Appeals: 4 Fed. (2d) 988.

Grounds of Jurisdiction of This Court.

The date of the judgment to be reviewed is January 12, 1925 (Tr., p. 69).

The appeal was prayed for on February 20, 1925 (Tr., p. 70), and allowed on February 27, 1925 (Tr., p. 70). The record was filed on March 17, 1925 (Tr., p. 72).

The record does not show any specific claims advanced or rulings made in the lower Court which are relied on as the basis of this Court's jurisdiction, but appellant, in his brief in the Circuit Court of Appeals, asserted rights under the Fifth Amendment to the Constitution of the United States.

The statutory provisions under which the jurisdiction of this Court is invoked are Judicial Code, Section 241 (Act of March 3, 1911, c. 231, 36 Stat. 1157), giving a right of appeal to or writ of error from this Court in any case in which the judgment or decree of the Circuit Court of Appeals is not made final and in which the matter in controversy exceeds one thousand dollars besides costs, and the same statute, Section 128 (36 Stat., 1133), as amended by Act of January 28, 1915, Chapter 22, Section 2 (38 Stat., 803), making the judgments and decrees of the Circuit Court of Appeals final *only* in cases where jurisdiction is dependent entirely on diversity of citizenship or under the patent, trade-mark, copyright, revenue or criminal laws or in admiralty.

The present case was brought originally in the District Court, pursuant to Section 9 of the "Trading with the Enemy Act," approved October 6, 1917, Chapter 106 (40 Stat., 411), and is therefore not one of the cases made final in the Circuit Court of Appeals under Section 128 of the Judicial Code.

The record shows that the matter in controversy exceeds $1,000, being an accounting of the interest or income on the sum of $1,502,552.55 from March 26, 1919 (Tr., p. 14), to dates of payment of the several installments thereof (Tr., p. 19) at the rate earned on bonds and obligations of the United States, wherein the fund was invested by the Treasury Department (Tr., pp. 41 and 52), i. e., *at least* 3½%, viz.:

On $518,776.27 from March, 1919, to March, 1921: approximately.....	$ 36,000.00
On $110,000 from March, 1919, to April, 1921: approximately.....	8,000.00
On $873,776.28 from March, 1919, to January, 1922: approximately.....	81,000.00
Total in controversy at least.....	$125,000.00

The jurisdiction of this Court in this class of cases was sustained in *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554.

Statement of the Facts.

On June 18, 1918, the Alien Property Custodian seized 2,298 shares of the capital stock of International Textile, Inc., a Connecticut corporation, then in the possession of and standing in the name of the plaintiff, upon the claim that the stock in reality belonged to a German firm, to wit: Alb. & E. Henkels of Langerfield, Germany, which was claimed to be an alien enemy (Tr., pp. 3-4, 13).

On March 26, 1919, these shares of stock were sold by the Alien Property Custodian for the sum of $1,518,000, and the amount received from such sale, after deduction of the expenses of sale, was deposited in the United States Treasury (Tr., pp. 14, 22).

Complainant, an *American* citizen, claimed that *he*—and *not* the German firm—was the owner of this stock at the time of the seizure, and duly instituted this suit in equity against the Alien Property Custodian and the Treasurer of the United States under the provisions of Section 9 of the Trading with the Enemy Act of October 6, 1917, Chapter 106 (40 Stat., 411, 419), as amended by the Act of June 5, 1920, Chapter 241 (41 Stat., 977), praying that he be adjudged and decreed to be the owner of said shares and that the Treasurer of the United States account for and pay over to him the net amount realized from the sale, *together with all interest or income earned thereon* (Tr., pp. 6, 13).

The cause was tried on July 5, 1921, before Honorable CHARLES M. HOUGH, Circuit Judge, sitting as District Judge, and resulted in a decree, dated July 6, 1921, in favor of plaintiff (Ex. A, Tr., pp. 21-22). It adjudged that plaintiff was the "sole owner" of the shares in question (Tr., p. 22, fol. 65). The decree thereupon directed as follows (Tr., p. 22):

> "That the defendant Frank White, as Treasurer of the United States of America, be and he is hereby directed to account for and pay over to the complainant the proceeds of the sale of the said 2298 shares of common stock of International Textile, Inc., now in his possession or custody, *together with the income or interest, if any, earned thereon.*"

Prior to the trial, the Treasurer had paid plaintiff $628,776.27 on account. Accordingly, upon the trial before Judge HOUGH the following stipulation was made (Tr., p. 14):

> "IT IS CONCEDED that the property was sold on March 26th, 1919, and realized the sum of $1,518,000.00, from which was deducted for the

expenses of sale, $12,947.45, leaving a balance of $1,505,052.55; from which there was deducted for administration expenses the sum of $2,500.00, which left a balance of $1,502,552.55, of which there has been paid to Mr. Henkels the sum of $628,776.27, leaving a balance in the Treasury of $873,776.28."

The amounts of principal belonging to the plaintiff which had been on deposit in the Treasury were, therefore, in round figures, as follows (Tr., p. 19):

March, 1919, to March, 1921 (two years) ...	$1,505,000.00
March, 1921, to April, 1921 (one month) ...	983,000.00
April, 1921, to payment of principal as hereinafter stated, January, 1922 (nine months)	873,000.00

On August 1, 1921, defendants appealed to the Circuit Court of Appeals from Judge HOUGH'S decree (Tr., p. 15). Plaintiff—the appellee on that appeal—served notice of a motion to affirm or to advance the cause for immediate argument upon the ground that it appeared from the transcript that the questions raised on the appeal were frivolous and did not justify extended argument (Ex. M, Tr., p. 44). Prior to the hearing of such motion, defendants *consented* to the dismissal of their said appeal (Tr., p. 43), and thereupon an order was made by the Circuit Court of Appeals on September 21, 1921, dismissing defendants' appeal upon consent without costs (Ex. N, Tr., pp. 45-46).

After the dismissal of the appeal, the Department of Justice wrote to the Treasury Department to prepare a warrant and check for the conceded amount of the *principal sum* awarded by the decree of this Court (Tr., pp. 47-48), and thereupon, on October 27, 1921, complainant's counsel was advised that the Department of Justice had received from the Treasury a check to complainant's order for the conceded balance of principal, to wit, $873,766.28.

Although the decree of the District Court (Tr., p. 22) had expressly required the Treasurer of the United States to pay over to the plaintiff not only the principal sum due to him but *also* "the income or interest, if any, earned thereon," and although there was no dispute as to the principal amount which was due—such amount having been stipulated upon the trial (see pp. 4-5 of this brief, *supra*)—the Treasurer of the United States declined to comply with the provisions of the decree, and refused to pay over the principal concededly due, unless plaintiff would execute a general release and consent to a satisfaction of judgment, the effect of which would be to relieve the Treasurer from the obligation to pay income or interest as required by the decree.

The plaintiff, after unavailing efforts to induce a more equitable attitude, executed the general release and consented to the satisfaction of the judgment under circumstances which the plaintiff claims constituted duress.

On December 15, 1923, the ALIEN PROPERTY CUSTODIAN made a report to the United States Senate (Ex. L, Tr., p. 40) which disclosed that up to March 4, 1923, the Treasurer of the United States had received and collected the sum of $27,009,812.14 as income earned on the proceeds of property seized under the Trading with the Enemy Act, which had been deposited with the Treasurer by the Alien Property Custodian.

Among the funds so deposited were the funds of the plaintiff. This having been brought to the attention of the plaintiff, he applied to the District Court to set aside the satisfaction of the decree and the general release, in so far as they applied to income or interest, and to name a master to take and state the account of the interest or income, if any, earned upon the principal of plaintiff's fund until its payment to him.

No objection was raised to the procedure of bringing the matter on by affidavits (in lieu of resorting to the more formal procedure of supplemental pleadings and the taking of evidence), a practice finding sanction in decisions of this Court (*Kelsey* v. *Hobby*, 16 Pet. 269; *Coburn* v. *Cedar Valley Land Co.*, 138 U. S. 196).

The District Court denied plaintiff's application and entered a final decree (Tr., pp. 56, 57) dismissing the application. An appeal was thereupon taken to the Circuit Court of Appeals for the Second Circuit, which (Tr., p. 69) affirmed the decree entered in the District Court.

The Opinion of the District Court.

In the District Court, LEARNED HAND, J., *erroneously assumed* that plaintiff had been offered by defendants, and defendants were willing to pay him, interest at the rates *actually* earned through investment of plaintiff's funds in United States securities, but that plaintiff insisted upon payment of interest at the *legal* rate of 6% per annum (Tr., p. 52). Upon *this* basis he reached the conclusion that there was no duress, and having reached this conclusion, did not pass upon the broader question whether an American citizen, whose property had been erroneously seized by the Alien Property Custodian, is entitled to the return, not only of the property seized but also of the income derived from such property while in the possession of the Alien Property Custodian or the Treasurer of the United States.

LEARNED HAND, J.'s assumption above referred to was contrary to the fact. The Alien Property Custodian and the Treasurer of the United States had *not* offered the plaintiff the income *actually* earned by the Treasurer of the United States upon the proceeds derived from the sale

of plaintiff's property. On the contrary, this had been expressly *refused*. They had declined to pay plaintiff *any* interest or income whatsoever (Tr., pp. 15, 48; Exs. D-H, inclusive, Tr., pp. 27-33).

The Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals declined to pass upon the questions of fact or law involved in the claim of duress. It considered *exclusively* the fundamental vital question whether an American citizen, whose property had been erroneously seized under the provisions of the Trading with the Enemy Act, is entitled to recover the income earned thereon in addition to the principal. The attitude taken by the Circuit Court of Appeals will best appear from the opening paragraphs of the opinion (Tr., p. 66):

> "This bill presents two questions:
> "1st. Can appellant, by his plea of duress, be relieved of the receipt and release executed by him? And, 2d, if such relief be granted, could he recover any more than he has received in this litigation?
>
> * * * * * * *
>
> "Of the two questions above stated we prefer to consider the second, for however interesting the question of duress may be, considering the trend of modern decisions, a judgment here favorable to appellant would leave the second question undetermined, while the second question, if decided adversely to appellant, disposes so far as we are concerned of the whole matter."

Under these circumstances, and in accordance with the decisions cited in Point IV of this brief (*infra*, p. 45), we do not deem it proper to present at this time the questions involved in the claim of duress, inasmuch as the Circuit Court of Appeals declined to pass thereon. Should

this Court find that the Circuit Court of Appeals erred in the determination upon the question of the right to recover income, this Court would, in accordance with its past practice, remand the case to the Circuit Court of Appeals, to have the questions of fact and law involved in the claim of duress reviewed by that Court in the first instance.

Errors Intended to be Urged.

Nos. 1-6, inclusive (Tr., pp. 70-71): Affirmance by the Circuit Court of Appeals of the decree of the District Court, which constituted, in effect, the dismissal of a supplemental bill of complaint and the refusal of any relief whatsoever to the plaintiff-appellant.

Nos. 7-9, inclusive (Tr., p. 71): Affirmance by the Circuit Court of Appeals of the decree of the District Court refusing to vacate and set aside the release and satisfaction of the prior decree of July 6, 1921, so far as appertained to defendants' duty to account for the interest or income, if any, earned upon the proceeds of plaintiff's property, to name a master, and to direct that the accounting should now proceed.

No. 10 (Tr., p. 71): Affirmance by the Circuit Court of Appeals of the refusal of the District Court to decree that the warrant for satisfaction of the prior decree and receipt or release were delivered involuntarily and under duress. (The question of fact was not determined by the Circuit Court of Appeals for the reasons stated *supra*, p. 8).

No. 11 (Tr., p. 71): The determination, in effect, by the Circuit Court of Appeals on the present appeal from the decree of the District Court entered May 23, 1921, that error had been committed in the *prior* decree of the

District Court entered July 6, 1921, by the inclusion in said prior decree of the words "together with the income or interest, if any, earned thereon."

Same Questions Involved in No. 561 on the Docket of This Court.

There is pending before this Court the case of *Kny* v. *Miller*, No. 561 of October Term, 1925, which is an appeal from the Court of Appeals of the District of Columbia (reported in 2 Fed. [2nd] 313) and involves the identical questions.

Summary of the Argument.

Point I—Under the true construction of the Trading with the Enemy Act, an American citizen whose property has been seized by the Alien Property Custodian under the mistaken belief that it was enemy owned, is entitled to the return not only of the property (or of the amount realized from its sale), but also of the income or interest earned thereon or derived therefrom while in the custody of the Alien Property Custodian or of the Treasurer of the United States. Any other construction would render the Trading with the Enemy Act void because in contravention of the Fifth Amendment to the Constitution of the United States. The Trading with the Enemy Act, neither by express language nor by fair inference, permits the Government to retain income derived from property of American citizens erroneously seized.

Subdivisions of Point I:

I, II and III—Statement of the statutory provisions giving the right of seizure, fixing the duty of the

Custodian with respect to property seized and the sale thereof, and the remedy of the owner of seized property.

IV—Practical construction of the Act (1) by the Alien Property Custodian, (2) by the President, and (3) by Congress.

V—The express language of the Act relating to the return of the "property" or its "proceeds" is broad and comprehensive enough to include income or interest earned.

VI—The general rule is that, upon the restoration of property to its rightful owner, the increment is to be deemed a part of the property.

VII—The purpose of the Trading with the Enemy Act was to do full justice to the rightful owner, and there was no intention by Congress to confiscate property.

VIII—All war-time acts which provide for the summary seizure of property of citizens are necessarily to be construed so as to afford such citizens just compensation, including the income or interest derived from the property seized. This is necessary to render the legislation valid under the Fifth Amendment to the Constitution.

IX—Discussion of the authorities relied on by court below and by appellees.

Point II—The Alien Property Custodian and the Treasurer of the United States are trustees for plaintiff, and in consequence may not retain the income derived from the property of their *cestui que trust*.

Point III—The fact that the funds derived from the sale of plaintiff's property were commingled by the Treasurer of the United States with other similar funds cannot deprive plaintiff of his rights.

Point IV—The judgment of the Circuit Court of Appeals should be reversed and the cause remanded to that court to pass upon the issues raised by plaintiff's charge of duress and defendant's denial thereof.

POINT I.

Under the true construction of the Trading with the Enemy Act, an American citizen whose property has been seized by the Alien Property Custodian under the mistaken belief that it was enemy owned, is entitled to the return not only of the property (or of the amount realized from its sale), but also of the income or interest earned thereon or derived therefrom while in the custody of the Alien Property Custodian or of the Treasurer of the United States. Any other construction would render the Trading with the Enemy Act void because in contravention of the Fifth Amendment to the Constitution of the United States. The Trading with the Enemy Act, neither by express language nor by fair inference, permits the Government to retain income derived from property of American citizens erroneously seized.

The right of the Alien Property Custodian to seize property *believed* to be enemy owned can no longer be questioned.

Central Union Trust Co. v. *Garvan*, 254 U. S. 554.
Stoehr v. *Wallace*, 255 U. S. 239.

This right is undoubted, even though it should develop that in any particular case the Alien Property Custodian was mistaken in his belief.

Having regard to the vast amount of enemy property in this country, much of it concealed; to the large number of persons of German origin residing here; to the atmosphere of suspicion which was engendered and inflamed during the progress of the war, it was inevitable that mistakes would be made by the Alien Property Custodian. The statute, as pointed out in *Central Union Trust Co.* v. *Garvan*, *supra*, and *Stochr* v. *Wallace*, *supra*, expressly contemplated the possibility of such mistakes.

In the case of property *actually* enemy owned, the United States, in the absence of congressional action, "could do with it what it liked."

White v. *Mechanics Securities Corp.*, — U. S. —, decided Dec. 14, 1925, 46 Sup. Ct. Rep. 116, 118.

In the case of property *not* actually enemy owned, the situation is different. With such property the United States could *not* "do as it liked." It could not confiscate such property without making just compensation; and this right of just compensation in the event of seizure is clearly accorded by the Fifth Amendment to the Constitution, notwithstanding the existence of war.

United States v. *L. Cohen Grocery Co.*, 255 U. S. 81.

United States v. *New River Collieries*, 262 U. S. 341.

Rockaway Pac. Co. v. *Stotesbury*, 255 Fed. 345.

Cf. *Ex parte Milligan*, 4 Wall. 2.

Let us then see just what the statutory provisions are which purport to protect the rights of one whose property may have been mistakenly seized.

I.

The Right of Seizure under the Trading with the Enemy Act.

This is provided for by Section 7 (c), as amended by the Act approved November 4, 1918, Chapter 201 (40 Stat. 1020), and, as so amended, reading as follows:

> "(c) If the President shall so require, any money or other property, including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this Act.
>
> * * * * * * *
>
> "The *sole relief and remedy* of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him, shall be that provided by the terms of this Act, and in the event of sale or other disposition of such *property* by the Alien Property Custodian, shall be

> limited to and enforced against the *net proceeds* received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." (Italics ours.)

By subsection "(e)" of the same Section 7 it was further provided (40 Stat. 418):

> "(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule or regulation made by the President under the authority of this Act."

II.

The Duty of the Alien Property Custodian with Respect to Unsold Property Which Has Been Seized, and His Right to Sell Seized Property.

These subjects are provided for by Section 12 of the Trading with the Enemy Act, as in part amended by the Act approved March 28, 1918, Chapter 28 (40 Stat. 450). This section, as so amended, in part provides as follows:

> "Sec. 12. That all moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.
>
> "All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid

to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depositary, or depositaries, of property of an enemy or ally of enemy, any bank or banks, or trust company, or trust companies, or other suitable depositary or depositaries, located and doing business in the United States. The alien property custodian may deposit with such designated depositary, or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts payable on demand which are required to be deposited with the Secretary of the Treasury), and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

* * * * * * *

"The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof. * * * The alien property custodian shall

forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him."

III.

The Remedy of a Person Whose Property Has Been Seized.

Section 9 (a) of the Trading with the Enemy Act, Act of October 6, 1917 (Chap. 106, 40 Stat. 411, 419), as amended by Acts of July 11, 1919 (Chap. 6, 41 Stat. 35), and June 5, 1920 (Chap. 241, 41 Stat. 977), provided as follows (there was a further amendment after the commencement of the action herein, Act of March 4, 1923, Chap. 285, 42 Stat. 1511, which will be considered hereafter):

> "Sec. 9. (a) That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian or seized by him hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian or seized by him hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require * * *. If the President shall not so order within sixty days after the filing of such application * * * *said claimant may,* at any time before the expiration of six months after the end of the war, *institute a suit in equity in the* * * * *district court* * * * (to which suit the alien property cus-

> todian or the Treasurer of the United States, as the case may be, shall be made a party defendant) *to establish the interest, right, title or debt so claimed*, and if so established, the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the alien property custodian or by the Treasurer of the United States, or the interest therein to which the court shall determine said claimant is entitled." (Italics ours.)

This Court has held that the remedy given under Section 9 is the *exclusive* remedy of the owner of property mistakenly seized, and that such remedy was *designed* to afford *full* protection to such owner by enabling him to secure "just compensation" for the seizure.

> *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554.
> *Stochr* v. *Wallace*, 255 U. S. 239.

This Court did not have before it the question of whether the just compensation involved necessarily *included* income or interest derived from the seized property while withheld from the owner.

IV.

The Practical Construction Given to the Trading With the Enemy Act by the Officials in Charge of It, by the Executive, and by Congress.

(1) *Construction by the Alien Property Custodian.*

Property mistakenly seized by the Alien Property Custodian may consist of cash, stocks, bonds or other property.

(a) If bonds were seized, the coupons collected by the Alien Property Custodian would be placed in a special income account; and when the principal would be returned, the income would be returned with it.

(b) If shares of stock were seized, the dividends upon these shares of stock paid to the Alien Property Custodian were placed in a separate income account, and when the shares would be returned, the dividends paid thereon would likewise be returned.

(c) If improved real estate was seized, the income and rents derived therefrom would be placed in a separate account, and when the principal would be returned, the income would likewise be returned.

(d) It is *only* where the property seized consists of *cash, or has been converted into cash* by the Alien Property Custodian, through the process of sale, that a *different* attitude has been taken, viz., to *retain* the income, though returning the principal.

This practice, which was conceded upon the hearing below and finds recognition in the opinion of the Circuit Court of Appeals (see pp. 20-21, *infra*) and in the opinion in *Kny* v. *Miller*, 2 Fed. (2nd) 313, was not occasioned by any requirement of the statute. On the contrary, the statute, Section 12, heretofore quoted (p. 15, *supra*), clearly authorizes the investment of cash. The $1,518,000 derived from the proceeds of plaintiff's property herein, were invested, it is true, but the reason why the income derived from such investment was not paid to the plaintiff was *merely* that the $1,518,000 were not earmarked in a *special* fund, but were commingled with the proceeds of *other* sold property and with cash seized, and such *commingled* funds invested, instead of individual investments having been made from *each* separate fund. None

the less, upon the books of the Alien Property Custodian each seizure is denominated a *separate trust* and is separately numbered (Tr., p. 122).

Thus the denial of relief to plaintiff was based upon the fortuitous circumstance that the Treasurer of the United States, before investing the plaintiff's funds, commingled the plaintiff's funds with those of others, *which he was in no way required to do;* and from this fortuitous circumstance it is claimed that the result now follows that the United States may *retain* for itself, free from any claim of the plaintiff, the large amount of income which has been earned upon plaintiff's property which had been erroneously and mistakenly seized.

If plaintiff's stock had not been sold by the Alien Property Custodian, plaintiff would have received all the income derived from this stock, even if such income had been declared by way of dividend, while such stock was held by the Alien Property Custodian; but because this particular asset belonging to plaintiff was not maintained in kind, as the Alien Property Custodian was authorized to do, but was converted into an asset of a different character, i. e., in the first instance into cash, and thereafter into Liberty bonds, the position is now taken that the plaintiff has been deprived of the right to be paid the income which was earned upon his property while withheld from him, and that such income may be *retained* by the United States.

The opinion of the Circuit Court of Appeals recognizes the Departmental practice. The opinion states (Tr., pp. 65-66):

> "It is now agreed that the Custodian never received any dividends on the stock *prior* to sale. Whatever profits or advantages resulted to anyone from the stock or its proceeds arose because in com-

pliance with Section 12 of the Act (40 Stat., 423), the Secretary of the Treasury had invested most of all the moneys realized from sales of property seized by the Custodian, in the securities of the United States yielding interest. There was never any such investment of the *specific* sum obtained from the sale of Henkels' stock or any other *particular* lot of seized property. Nor had the Secretary invested all the money so received by him from the Custodian, because there was kept on hand a cash balance of approximately five million dollars at all times to provide for obvious possible contingencies. But from the investment of the major portion of the moneys realized from Custodian's sales there had accrued in the Treasury of the United States prior to March 4, 1923, the sum of twenty-seven million dollars (Document No. 10, Senate, 68th Congress, 1st Session).

"To some equitable portion of this income, interest or increment Henkels laid claim under the decree above recited." (Italics ours.)

Whatever may be the legal rights of the United States to retain this income and to deprive the plaintiff thereof, there will, we take it, be no attempt to justify its position in point of equity or morals.

A further consideration, however, may be appropriate at this juncture. What is there in the Trading with the Enemy Act which justifies the Treasurer of the United States or the Alien Property Custodian in paying dividends received or coupons or rent collected, which does not *equally* justify or require the payment of interest earned on the proceeds of sale?

(2) *Construction by the Executive.*

Executive Order No. 2813 signed by the President February 26, 1918, "Prescribing Rules and Regulations Respecting the Exercise of the Powers and Authority and

the Performance of the Duties of the Alien Property Custodian Under the 'Trading with the Enemy Act,' and Prior Executive Orders Pursuant Thereto, and Respecting the Deposit and Investment of Moneys Received by or for the Account of the Alien Property Custodian," contains the following, among other things:

"(5) DEPOSIT AND INVESTMENT OF MONEYS RECEIVED BY THE ALIEN PROPERTY CUSTODIAN.

"There shall be deposited in the Treasury of the United States, through the office of the Secretary of the Treasury—

"(a) Any and all moneys (including checks and drafts payable on demand) paid to or received by the Alien Property Custodian pursuant to the 'Trading with the Enemy Act';

"(b) Any and all moneys (including checks and drafts payable on demand) collected or received by the Alien Property Custodian, as dividends or interest or income that may become due upon any stocks, bonds, notes, time drafts, time bills of exchange, or other securities or property held by the Alien Property Custodian or by any depositary or depositaries designated as provided in said Act for the account of the Alien Property Custodian;

"(c) Any and all moneys collected as the proceeds of any and all maturing obligations held by the Alien Property Custodian or by any such depositary or depositaries for the account of the Alien Property Custodian; and

"(d) Any and all moneys paid to or received by the Alien Property Custodian as the proceeds of any sale or sales, made at any time pursuant to such rules and regulations as the President shall prescribe, of any and all property or rights which shall come into the possession of the Alien Property Custodian in pursuance of the provisions of said act.

* * * * * * *

"Any and all moneys so deposited in the Treasury of the United States, as herein provided, as well as all moneys, if any, which may be paid to the Treasurer of the United States, as provided in section 12 of said act, and all interest, dividends or other income, if any, in respect of any property conveyed, transferred, assigned or delivered to the Treasurer of the United States as provided in said section 12, shall be credited by the Treasurer of the United States to the Secretary of the Treasury *'for account of the Alien Property Custodian.'*

"Any and all money so deposited in the Treasury of the United States, as herein provided, together with any *interest or income received from the investment thereof*, shall be subject to withdrawal by the Secretary of the Treasury for the purpose of making any payment or payments pursuant to the provisions of said act, and, until so withdrawn, *may be invested and reinvested*, from time to time, by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness. The bonds and certificates of indebtedness, in which such moneys shall be so invested, shall be held by the Secretary of the Treasury *for account of the Alien Property Custodian*, subject to the provisions hereof and of said act and to such further orders, rules or regulations as may, from time to time, be prescribed by me." (Italics ours.)

It will be noted in this Executive Order that the income was to be credited "for account of Alien Property Custodian." It is further to be noted that not only money deposited with the Treasurer but also *"any interest or income received from the investment thereof"* was to be subject to withdrawal by the Secretary of the Treasury "for the purpose of making any payment or payments pursuant to the provisions of said Act." *The only payments provided for by the Act, however, were the claims of citizens and other non-enemies under Section 9*

(*supra*, p. 17). It is further to be noted that the bonds and certificates of indebtedness in which the money was to be invested were likewise to be held "for account of the Alien Property Custodian, subject to the provisions hereof and of said Act," etc.

It is evident from the above language that there was no thought in the Executive's mind that the income derived from the investment of cash was to be treated differently than the cash itself. There was no idea in the Executive's mind that this income was to be *retained* by the United States of America. On the contrary, the fact that it as well as the principal were to be credited and held "for the account of the Alien Property Custodian" indicates clearly that in the matured opinion of the Executive such income was something which the Alien Property Custodian was, in turn, accountable for under the terms of the Trading with the Enemy Act.

(3) *Construction by Congress.*

The Departmental construction that the Trading with the Enemy Act requires the return not only of principal, but of income collected (which is not applied in the present instance merely because by reason of the commingling of funds the income is claimed not to be identifiable), has received the express sanction of Congress. By the so-called Winslow Act (approved March 4, 1923, Chap. 285, 42 Stat. 1511), Section 9, subsection (b) of the Trading with the Enemy Act was amended, among other things, by adding paragraphs "(9)" and "(10)" to provide that citizens of Germany, Austria, etc., whose property had been seized, and whose property so seized, or the proceeds thereof, exceeded $10,000, should be entitled to the return of $10,000 of such property so seized, or the proceeds thereof; and Section 9, subsection (i) of the same Act provided that

> "For the purposes of paragraphs (9) and (10) of sub-section (b) of this section *accumulated net income, dividends, interest, annuities, and other earnings shall be considered as part of the principal*" (42 Stat. 1515). (Italics ours.)

This provision is clearly significant of the intention of Congress that the "*property*" of anyone seized—which in the case of enemies was to be held for future Congressional action, and in the case of non-enemies was to be returned as the result of demand or judicial action—was to be considered not merely as the principal, or corpus of the property seized, but was to include the income, dividends, or earnings accumulated thereon or derived therefrom while in the custody of the Alien Property Custodian or the Treasurer of the United States. It is to be remembered that the identical provisions of the Trading with the Enemy Act refer to the proceeds of the sale of enemy property and to the proceeds of the sale of property of American citizens erroneously deemed to be enemy property.

Under the construction given to the Act by the Courts below, therefore, the American owner, whose property had been seized by mistake, is in a worse position than if he were actually an enemy and his property had been taken.

There is nothing, we submit, in the Act which prevents the Treasurer of the United States from paying over the income earned from the investment of cash realized from the sale, and, on the contrary, we submit that the Act required him so to do. The question of the commingling of the proceeds of property of various persons sold raises no *legal* question as to either *rights* or *obligations*. It raises merely a question of *accounting*. There is obviously no inherent difficulty in ascertaining the average rate of in-

terest which has been earned on all funds comprised within this general fund, and allocating to each share in that fund its proportionate share of such interest (see Point III, *infra*).

V.

The Express Language of the Trading With the Enemy Act, Relating to the Return of the "Property" or Its "Proceeds," Is Broad and Comprehensive Enough to Include Income or Interest.

At this point we may more particularly note the exact language of the statute.

Section 9 (a), quoted *supra* (p. 17), authorizes a suit to establish the "interest, right or title" of a claimant in and to "money or property" which has been seized by the Alien Property Custodian. The term "money" as used in that section clearly has reference to money which may have been seized, *not* to money derived from any *sale* of property seized. This is shown by the context.

However, in the case of a sale prior to the institution of suit, it is provided by Section 7 (c), quoted *supra* (pp. 14-15), that "the remedy provided by the terms of this Act" [i. e., the remedy provided by Section 9 (a)] "shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

What then is included within the term "property" as used in Section 9 (a) and within the term "proceeds" as used in Section 7 (c)?

(1) The term "property" is "a generic term of extensive application" (32 *Cyc.* 647). It is said to be "*nomen generalissimum.*"

Boston etc. Corporation v. *Salem R. R. Co.*, 2 Gray (Mass.) 1, 35.
Wilson v. *Beckwith*, 140 Mo. 359, 373.
Rossetter v. *Simmons*, 6 Serg. & R. (Pa.) 452, 456.

It includes not merely possession of the *res* but all rights in and over the *res*, such as the rights of user, exclusion and disposition.

Dixon v. *People*, 168 Ill. 179, 190.

See also:

Eaton v. *Boston R. R. Co.*, 51 N. H. 504, 511.
Chicago R. R. Co. v. *Englewood R. R. Co.*, 115 Ill. 375, 385.

The statute, Section 9 (a), permits the claimant expressly to establish his "interest, right and title" to the "property." The rights of plaintiff in and to the stock seized by the Alien Property Custodian were not merely the rights to the physical possession and ownership thereof, but they *included* his right exclusively to enjoy and receive the income to be derived therefrom. Such right within all the definitions constitutes "property" and has frequently been classed as such within the meaning of the Fifth and Fourteenth Amendments to the Constitution.

(2) The word "proceeds," as used in Section 7 (c), is no less comprehensive. It is a "word of great generality."

Phelps v. *Harris*, 101 U. S. 370, 380.

It is a word of "equivocal import. Its construction depends upon the context."

Thomson's Appeal, 89 Pa. St. 36, 45-46.
Armour Packing Co. v. *London*, 53 S. C. 539, 543.

It is a word "of loose and varying significance."

Kidwell v. *Ketler*, 146 Cal. 12, 21.

It has frequently been construed to denote or include income.

Hunt v. *Williams*, 126 Ind. 493.
Birmingham v. *Lesan*, 77 Me. 494, 497.
Gibbs v. *Barkley*, 242 S. W. 462, 465 (Tex., 1922; not officially reported).
Thomson's Appeal, supra.

VI.

As a General Rule, Upon Restoration of Property to Its Rightful Owner, the Increment Is to Be Deemed to Be a Part of the Property Originally Taken.

While the decisions hereinafter referred to are not claimed to be controlling in the case at bar, they at least constitute pertinent analogies which may be invoked as an aid to the proper construction of the statute.

Where personal property is taken from the real owner, it is the general rule that the increment, accruing while such property is withheld, is to be deemed a part of the property taken and must be returned with it. It has been so held with respect to the increase of live stock and the children of slaves in cases of failure of title due, for

example, to default by a conditional vendee, a sheriff's error in levying, or the making of a void lease by a farmer's widow under the belief that as widow she possessed the powers of an administratrix and guardian.

Foster v. *Gorton*, 5 Pick. (Mass.) 185.
Jordan v. *Thomas*, 31 Miss. 557.
Buckmaster v. *Smith*, 22 Vt. 203.
Phipps v. *Martin*, 33 Ark. 207.
Williamson v. *Daniel*, 12 Wheat. 568, 570.

VII.

In Construing the Trading With the Enemy Act, There Must Be Borne in Mind Both That Its Purpose Was to Do Full Justice to the Rightful Owner, and, on the Other Hand, That There Was No Intention by Congress to Confiscate Property.

It is elementary that a Federal statute must be construed in the light of the manifest purpose of Congress. The Court should endeavor to give effect to the intention of Congress. Unless absolutely required by its language, no act should be construed so as to give to it an effect contrary to what was intended. No citation of authorities is necessary in support of these elementary principles.

It must be assumed that Congress had the Fifth Amendment to the Constitution in mind when it enacted the Trading with the Enemy Act. It must be assumed, therefore, that what Congress intended to provide was *just and adequate compensation.* Particularly is this so, because the true owner whose property was taken was deprived by the very terms of the statute of the ordinary remedies of injunction, ejectment, replevin and even of a right of

action against the erring officer to recover damages for the trespass. These would be at his command in the event of the enactment of a peace statute which purported to permit his property to be taken without just compensation.

Meigs v. *M'Clung's Lessee*, 9 Cranch. 11, 18.
Mitchell v. *Harmony*, 13 How. 115
Tweed's Case, 16 Wall. 504, 518-519.
U. S. v. *Lee*, 106 U. S. 196.
Concession in the Solicitor General's Brief in *U. S.* v. *North American Co.*, 253 U. S. 330.

It is, of course, unthinkable that Congress should have intended the confiscation of *American*-owned property. But we go further. The debates and public documents indicate that it was not intended to confiscate even *enemy* property. The Act was one having for its purpose the conservation of property during the war, not its confiscation.

See:

Report No. 85, to accompany H. R. 4960, House of Representatives, 65th Congress, First Session.
Hearing before Sub-Committee of Committee on Commerce, U. S. Senate, 65th Congress, First Session, on H. R. 4960, pp. 131-132.
Senate Reports Nos. 111 and 113, 65th Congress, First Session, to accompany H. R. 4960.

In the last mentioned reports, it is expressly stated, among other things (p. 9), that "the theory on which the bill is drafted is that enemy property shall be protected and utilized but *not confiscated.*"

On November 14, 1917, Mr. Palmer, the then Alien Property Custodian, issued Official Bulletin No. 159, which was expressly approved by the President, in which he stated,

referring to enemy property: "There is of course *no thought of the confiscation* or dissipation of the property thus held in trust."

Conceding for the sake of argument that Congress had the power to order confiscation of enemy property, it must be presumed that Congress had in mind not only the past political history of this country but the statement of Chief Justice MARSHALL in *Brown* v. *U. S.*, 8 Cranch. 110, 128, that no nation could (even in 1814) exercise such a power "without obliquity," and that Chief Justice MARSHALL in *U. S.* v. *Percheman*, 7 Pet. 51, deemed the confiscation of private property to be illegal, and that in *Hanger* v. *Abbott*, 6 Wall. 532, the Court referred to the right of confiscation of enemy property "as a naked and impolitic right not contemplated by the enlightened conscience and judgment of modern times." This was written in 1868.

If this be the history of our judicial utterances, expressive of the conscience of the American nation with respect to the confiscation of enemy-owned property, surely it must be held that Congress distinctly did *not* intend the confiscation of property owned by American citizens. Yet, unless the Act be construed to provide for the return of the income, as well as of the principal of property seized by the Alien Property Custodian, it clearly provides for confiscation.

VIII.

All War-Time Acts Which Provide for the Seizure of Property of American Citizens Are Necessarily to Be Construed so as to Afford Such Citizens Full Compensation, Including the Income or Interest Derived From the Property Seized.

The Fifth Amendment to the Constitution is not self-executing, for, despite its adoption, the Federal courts have adhered to the English common law rule that the sovereign cannot be sued without its consent, and that, if sued, the extent of the recovery must be within the limits of the statute authorizing suit, whether or not this would afford full and adequate compensation.

U. S. v. *Lee*, 106 U. S. 196, at 205-209.
Schillinger v. *U. S.*, 155 U. S. 163.
Basso v. *U. S.*, 239 U. S. 602.
U. S. v. *North American Co.*, 253 U. S. 330.

Where property has been seized or is about to be seized by some agency or official of the Government, the owner of the property must in the first instance consider whether a statute purports to authorize such seizure. If the seizure be unauthorized by statute, the Government would not be liable because the act would be a tort merely of the individual officer (*Tracy* v. *Swartwout*, 10 Pet. 80; *Tweed's Case*, 16 Wall. 504, 518-519). If, on the other hand, a *peace time* statute purported to authorize the seizure, then there would be raised, by implication of law, the obligation of the Government to pay for the property. This is an implied "contract" of the Government upon which Congress has by statute given permission to sue in the

Court of Claims, or, if the amount be less than $10,000, in the District Court without a jury. Such permission, however, is to sue merely for the principal. It does not authorize the recovery of interest. While equitably it might be said that the Government should pay interest in such cases, the harsh rule of the common law is adhered to, viz., that as the Government has not consented to be sued for interest, there is no jurisdiction in the Court to hold it beyond the letter of the statute.

The true owner of property is, however, not without remedy. He can invoke the Fifth Amendment by asserting that a seizure which does not provide full compensation to him (and full compensation necessarily either includes interest or else implies that the payment of compensation be concurrent with the taking) is in violation of the Fifth Amendment to the Constitution. If such seizure be threatened, he may enjoin it. If it has been effected, he may invoke the remedies of replevin or ejectment, whichever may be appropriate in the case. His action, of course, would be not against the United States, but against the officer personally, and it would include recovery of the income derived from the property while unlawfully detained or damages for its detention.

In the case of *war-time statutes* the situation is different. If the seizure of privately owned property becomes necessary for the proper prosecution of war, it stands to reason that the Government's *attempted* seizure should not be restrained pending the ascertainment and payment of just compensation. To do so would frustrate the very purposes of such statutes and render them impotent and nugatory. Therefore, in the Trading with the Enemy Act, it is provided that the remedy given under Section 7 (c), *supra*, is **exclusive**, and it has been expressly decided by this Court that the Alien Property Custodian may *not* be enjoined from taking possession of property by the claim—

even if true—that the property is not enemy owned (*Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239). Moreover, Section 7 (e) of the Trading with the Enemy Act (40 Stat. 418; p. 15, *supra*) expressly deprives the true owner of any cause of action against any *officer* of the Government who may be concerned with the taking of the property.

Having thus relegated the owner to a single specific remedy, it is essential that this remedy be construed in the light of the Fifth Amendment.

A similar situation has arisen under *Section 10 of the Lever Act* and under the *Emergency Shipping Act*. In each of those acts there was provision for the seizure of property of American citizens by officers of the Government, in the interest of the successful prosecution of the war. By each of those acts an exclusive remedy was given to the true owner. It was provided that he might sue the Government in the one instance in the District Court, and in the other instance under Judicial Code, Sections 24 (20) and 145, to recover "just compensation" for the property taken. Under those acts the character of the property to be taken is such that it would presumably be used by the Government. Consequently, it could not be returned in its original condition nor its value determined by a sale made thereof by the Government, for it was not intended to be sold but to be used. Therefore, those acts use the general phrase of awarding "just compensation."

Neither in the *Lever* Act nor in the *Emergency Shipping* Act was there an *express* provision awarding interest or income; but this Court held that the broad language used must be construed so as to include such award.

Seaboard Air Line v. *U. S.*, 261 U. S. 299.
Brooks-Scanlon v. *U. S.*, 265 U. S. 106, 123.
Campbell v. *U. S.*, 266 U. S. 368, at 370-371.

In the Trading with the Enemy Act, however, it was contemplated either that the *specific res* would remain intact to be returned or that it would in the meantime be sold. The sale was to conclusively fix its value *as of the time of sale.* The amount realized would include payment for any increment in value arising *between the taking and the sale.* Therefore, the Trading with the Enemy Act used the phraseology of "property" and "proceeds" and of "interest, right and title" of the owner thereof, as distinguished from the language "just compensation" used in the Lever Act and Emergency Shipping Act. *But the purpose of all these acts was the same. It was to afford the true owner just compensation, and this necessarily involved that he be awarded interest or income, as the case may be.*

IX.

The Authorities Relied on by the Appellees Considered.

In the Court below the appellees relied on

Kny v. *Miller*, 2 Fed. (2nd) 313,

a case in which the identical question is involved and which is No. 561 now on the calendar of this Court.

The other authorities primarily relied on were:

U. S. v. *North American Co.*, 253 U. S. 330.
U. S. v. *North Carolina*, 136 U. S. 211.
U. S. v. *New York*, 160 U. S. 598.
U. S. ex rel. Angarica v. *Bayard*, 127 U. S. 251.

All of these cases turn upon the general proposition that the sovereign cannot be sued without its consent;

that in the case of suit to recover damages for breach of a contract, express or implied, interest is not recoverable in the absence of express statutory authorization for such recovery; and in those actions which were brought in the Court of Claims, there was further emphasized the fact that the jurisdiction of that court expressly *excludes* an award of interest, unless such interest has been provided for by statute (*Judicial Code,* Sec. 177; Act of March 3, 1911, Ch. 231, 36 Stat. 1141).

It is respectfully submitted that these decisions are not in point. There is *not* pending here any action *at law* against the sovereign to recover interest for *breach of contract* upon the theory of damages for delay. The recovery sought is of income derived from plaintiff's *own* property; the primary basis for such recovery is that the *statute,* correctly interpreted, authorizes and provides for such payment. If this be so, interest would be recoverable even if the action were brought in the Court of Claims.

Brooks-Scanlon Co. v. *U. S.,* 265 U. S. 106.

In none of the cases cited except *Kny* v. *Miller, supra* (which is of no greater authority than the decision below), was there involved a *war time* statute.

In *U. S.* v. *North American Co.,* 253 U. S. 330, it was conceded by the solicitor general in his brief that the statute involved being a peace time statute, the plaintiff whose property was taken could have invoked the remedy of injunction. The solicitor general, in support of this concession, cited:

Meigs v. *M'Clung's Lessee,* 9 Cranch. 11.
Wilcox v. *Jackson,* 13 Pet. 498.
Brown v. *Huger,* 21 How. 305.
U. S. v. *Lee,* 106 U. S. 196.
Scranton v. *Wheeler,* 179 U. S. 141.

The person whose property was there taken had a *choice of remedies.* He could procure an injunction which would secure him not only in the possession of the *res* itself, but also in the income to be derived from the *res;* or he could bring an action against the Government upon the basis of the implied contract to compensate, in which event, however, he was not entitled to recover interest based upon any delay in paying such compensation. (As a matter of fact, as shown in the opinion of this Court, the delay in that case was primarily the fault of the *owner* of the property.)

There is no analogy between that case and the one at bar. Here under the *war time* statute the plaintiff had *no* choice of remedy. His action *in equity* under the Trading with the Enemy Act was his *exclusive* remedy. In other cases, under *war time* statutes, in essentials not differing from the TRADING WITH THE ENEMY ACT, this Court has held that the rule laid down in *U. S.* v. *North American Co., supra,* has no application.

> *Seaboard Air Line* v. *U. S., supra,* 261 U. S. 299.
> *Brooks-Scanlon* v. *U. S., supra,* 265 U. S. 106, 123.

This discussion disposes likewise of:

> *U. S.* v. *North Carolina, supra,* 136 U. S. 211, and
> *U. S.* v. *New York, supra,* 160 U. S. 598.

It likewise disposes of the case primarily relied on by the appellees.

> *U. S. ex rel. Angarica* v. *Bayard,* 127 U. S. 251.

It may, however, not be amiss to observe that in that case there was never taken any property *belonging to the complainant.* The complainant's claim was against *Spain.*

The United States entered into a treaty with Spain, as a result of which *Spain paid to the United States* a certain amount in settlement of the claims of American citizens against it. The income earned upon the payment received by the United States from Spain *never* was any income *derived from complainant's property.* The money received from Spain was the *property of the United States* when received. True, the United States had a moral obligation to distribute the fund received by it among the claimants for whose benefit, in part, it had negotiated the treaty, but its obligation was obviously of a wholly different character from the obligation that it owes to its citizens when it takes their property.

X.

Conclusion.

It is respectfuly submitted, in conclusion, that the true intent and meaning of the Trading with the Enemy Act is that the American owner whose property was erroneously seized should have full and adequate compensation, and that such compensation necessarily would include the income or interest derived from his property while withheld from him. This construction is not only justified by the language of the Act, and by its practical interpretation, but is required so as to save it from invalidity under the Fifth Amendment to the Constitution.

POINT II.

The Alien Property Custodian and the Treasurer of the United States are trustees for plaintiff, and in consequence may not retain the income derived from the property of their *cestui que trust.*

Section 6 of the Trading with the Enemy Act expressly provides that the Alien Property Custodian, with respect to money and property coming into his possession, is to "hold, administer and *account for* the same under the general direction of the President and as provided in this Act" (Act of Oct. 6, 1917, Ch. 106, Sec. 6; 40 Stat. 415).

On November 14, 1917, the Alien Property Custodian issued an official bulletin, approved by the President, which we have quoted (pp. 30-31, *supra*), which in referring to property seized by the ALIEN PROPERTY CUSTODIAN, stated:

> "There is, of course, no thought of the confiscation or dissipation of the property thus *held in trust.*"

The WINSLOW ACT, approved March 4, 1923 (Ch. 285, 42 Stat. 1511), amends Section 9 of the Trading with the Enemy Act by authorizing the return of not exceeding $10,000 of the principal of each of the separate "*trusts*" of property seized by the Custodian. Property seized by the Alien Property Custodian or proceeds thereof is in Section 9 (h) (42 Stat. 1515) described as constituting a "*trust.*" The WINSLOW ACT also adds new sections to the Act. Section 23 (42 Stat. 1516) directs the Custodian to pay

> "to the person entitled thereto * * * the net income * * * accruing and collected thereafter on

> any property or money *held in trust for such person* by the Alien Property Custodian or by the Treasurer of the United States for the account of the Alien Property Custodian * * *."

Section 24 (42 Stat. 1516) authorized the Custodian to pay taxes and expenses incurred in securing possession or protecting or administering the property out of the money or property involved, or, if that be insufficient, "out of any other money or property *held for* the same person."

Thus, Congress expressly intended that seizure by the Alien Property Custodian should result in the creation of a trust relationship. This likewise has uniformly been recognized by the officials having the administration of the statute in charge. Ever since the enactment of the TRADING WITH THE ENEMY ACT, every seizure of property has been designated by the Alien Property Custodian as a "trust."

In the opinion of the Circuit Court of Appeals it is intimated that there is a distinction between the position of the Alien Property Custodian and of the Treasurer of the United States respectively towards plaintiff (Tr., p. 68), but we submit that the alleged distinction is non-existent. The Treasurer of the United States holds the funds, or the securities in which they are invested, "for the account of" the Alien Property Custodian and pursuant to the Act. (See the language of the statute quoted pp. 15-16 and Executive Order, quoted pp. 22-23 of this brief, *supra.*) Obviously, therefore, his position is no different from that of the Alien Property Custodian. If the Alien Property Custodian be a trustee, the Treasurer of the United States receives funds from such trustee *with knowledge of the trust relationship.* The trust character of such a holding cannot be lost by such a transfer where there is knowledge by the transferee of the trust relationship.

Nor can there be any distinction in the trust relationship between property seized and its proceeds. A trustee

cannot divest himself of his responsibility by disposing of the trust property. It is an elementary principle of law that the trust relationship attaches to the proceeds of trust property sold by the trustee.

We do not believe that it is necessary to dilate at length upon this feature of the case, for only recently in *U. S. v. Chemical Foundation, Inc.*, this question was most fully presented to this Court and is now under advisement. In that case counsel representing the United States, *with respect to enemy property*, took the same position which we are asserting in the case at bar with respect to *American* owned property. We therefore content ourselves upon this branch of the case with referring this Court to the arguments and authorities and analysis of the statute advanced in that case.

One suggestion in the Circuit Court of Appeals, however, should be briefly noted. It is stated in the opinion (Tr., pp. 66, 67):

> "Appellant's proposition is that the Custodian became a trustee for Henkels in respect of this stock and its proceeds. It is now adjudicated that there was never any right to seize the stock, wherefore the Custodian must respond, like any other trustee who has made profit out of the fund for which he is held ultimately responsible.
>
> "It is undoubtedly true that in a certain sense the Custodian is a trustee. He is called by that name in the 12th section of the Act (40 Stat. 423), and he has called attention to his trusteeship for the public at the bar of this and many other Courts.
>
> "But if appellant's theory of attack be considered closely it is clear that the trusteeship that he invokes as against the Custodian is one arising ex maleficio. It is a trusteeship created by a wrong; and that wrong was a seizure of property belonging to an American citizen and unaffected by enemy ownership.

> "The niceties of the law of torts have not been and cannot be strictly regarded in statutes passed under the stress of war and designed to meet war conditions."

It is submitted that plaintiff is not under the necessity of maintaining that defendant is a trustee *ex maleficio*, though there would appear to be no reason for denying plaintiff relief if the defendants *were* held to be trustees *ex maleficio*.

The trust, we submit, is primarily one *created by the statute*. The opinion of the Circuit Court of Appeals says (Tr., p. 67):

> "But this much is, we think, clear, that it can never be said that by reason of conduct such as occurred in this case of Henkels the Custodian became a trustee for Henkels in the same sense that he would have become a trustee under a deed *inter partes*, or by reason of an actionable wrong."

We submit that the trusteeship was created not by reason merely of the *conduct*, i. e., the seizure, but by the *very terms of the act*, which imposes upon the seizure, rightful or wrongful, the character of a trusteeship for the benefit of the real owner.

But if it were necessary to term the trusteeship one *ex maleficio*, even this would be no bar to plaintiff's recovery. Such a designation does not necessarily involve an intentionally wrongful act. The transaction, however, is more properly to be termed a constructive or implied trust. Such relation is created or implied in law in the case of a mistaken seizure, just as it is in the case of an unintentional tortious seizure.

Smith v. *Orton*, 131 U. S., Appx. lxxv.
McKee v. *Lamon*, 159 U. S. 317.
Order of St. Benedict v. *Steinhauser*, 234 U. S. 640.
Chicago, &c., Ry. v. *Des Moines, &c., Ry.*, 254 U. S. 196.

Assuming even that in the case of property actually enemy owned a trust would exist only by reason of the obligations imposed by the statute, we submit that in the case of a seizure of property of an American citizen mistakenly taken for that of an enemy, the trust relation has been imposed *both* by the provisions of the statute, and independent of the statute, from the very fact that the Alien Property Custodian has taken possession of property *not* belonging to an enemy, which he is bound to return to the true owner.

Whatever obligations this relation may or may not impose upon the Alien Property Custodian, or the Treasurer of the United States, we submit that *it is unthinkable that it authorizes him either individually or in a representative capacity to make a profit out of the property which he has erroneously seized.*

POINT III.

The fact that the funds derived from the sale of plaintiff's property were commingled with other funds cannot deprive plaintiff of his rights.

If after the sale of plaintiff's shares of stock and payment by the Alien Property Custodian to the Treasurer of the United States of the amount realized from the sale, the latter had kept an accurate account of the investment

of this *particular* fund in Liberty bonds, there can, we believe, be no doubt that plaintiff would be entitled to the proceeds of the interest coupons on the bonds. Similarly, if every dollar of Custodian money in the hands of the Treasurer had been invested in government bonds at one uniform rate of interest, there would be no difficulty in saying that each fund owner was entitled to the interest at that rate. However, as pointed out in the opinion of the Circuit Court of Appeals (Tr., p. 65) it was the practice of the Treasurer to leave at all times several million dollars uninvested as a working cash balance. Accordingly, it is claimed by the Treasurer that he has rendered it impossible to determine that any *particular* owner's moneys were either invested or uninvested.

In such cases, however, the law does not permit justice to be defeated by the fortuitous circumstance that administrative officers have failed to keep proper records or make proper segregation of each fund, but decrees that each party, who is entitled to relief, shall receive his aliquot proportion of the entire increment. The situation is analogous to that of the commingling of property of any nature.

Intermingled Cotton Cases, 92 U. S. 651.
The Distilled Spirits, 11 Wall. 356.
Great Southern Co. v. *Logan Co.,* 155 Fed. 114, cert. den. 207 U. S. 590.
Duel v. *Hollins,* 241 U. S. 523, 529.

POINT IV.

The judgment of the Circuit Court of Appeals should be reversed and the cause remanded to that court to pass upon the issues raised by plaintiff's charge of duress and defendant's denial thereof.

As pointed out in our discussion of the opinions of the District Court and of the Circuit Court of Appeals (pp. 7-8, *supra*), the District Judge decided adversely to plaintiff's claim of duress and dismissed the application, and the Circuit Court of Appeals declined to review or in any wise pass upon that issue, basing its decision upon the proposition of law that plaintiff has no right to the income earned by the defendant Treasurer.

We understand it to be the settled practice of this Court under such circumstances, that, if this Court determines that the Circuit Court of Appeals was in error upon the question of plaintiff's right to the earned income, the cause should be remanded to the Circuit Court of Appeals with instructions to consider the questions of fact and law which were presented by the charge of duress and the traverse thereof, and which that court expressly declined to consider.

Gerdes v. *Lustgarten*, 266 U. S. 321, 327-328.
Lutcher & Moore Lumber Co. v. *Knight*, 217 U. S. 257.
Brown v. *Fletcher*, 237 U. S. 583.

Dated, March 5, 1926.

Respectfully submitted,

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Counsel for Appellant.

CONTENTS

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 318

MAX HENKELS, APPELLANT

v.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, and Frank White, as Treasurer of the United States of America

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES

PREVIOUS DECISIONS IN THIS CASE

The opinion of the Circuit Court of Appeals (R. 65) is reported in 4 F. (2d) 988. The opinion of the District Court has not been reported but will be found on page 51 et seq. of the record.

GROUNDS FOR THE JURISDICTION OF THIS COURT

This case is before this Court upon an appeal from a judgment of the Circuit Court of Appeals for the Second Circuit, dated January 12, 1925 (R. 69), which affirmed a decree of the District Court

of the United States for the Southern District of New York dated the 23rd day of May 1924 (R. 56).

The appeal has been prosecuted pursuant to Section 241 of the Judicial Code (c. 231, 36 Stat. 1157). The suit was instituted in the District Court pursuant to the provisions of Section 9 of the Trading with the Enemy Act as amended June 5, 1920 (c. 241, 41 Stat. 977). The provisions of the Judicial Code respecting appeals are made applicable to suits under Section 9 of the Trading with the Enemy Act by Section 17 of that Act (c. 106, 40 Stat. 425).

STATEMENT OF THE CASE

The plaintiff a citizen of the United States instituted his suit in the District Court to recover from the Alien Property Custodian and/or the Treasurer of the United States, the proceeds of the sale of 2,298 shares of the common capital stock of the International Textile, Inc., a Connecticut corporation, which had been seized by the Alien Property Custodian as the property of Alb. & E. Henkels, enemies, and later sold and the proceeds of the sale deposited in the Treasury of the United States. The stock had been sold by the Custodian for $1,518,000. Prior to the institution of the suit part of this sum had been paid to the plaintiff pursuant to Executive action and there remained in the Treasury of the United States of the proceeds of the sale, the sum of $873,776.28, which the plaintiff claimed should also be paid to him.

Plaintiff was successful in his suit and on July 6, 1921, a decree was entered which directed that the Treasurer of the United States " account for and pay over to the complainant the proceeds of the sale of said 2,298 shares of the common stock of the International Textile, Inc., now in his possession or custody, together with the income or interest, if any, earned thereon."

Thereafter the sum of $873,776.28 was paid to the plaintiff by the Treasurer of the United States and on the 28th day of November, 1921, he gave a receipt and release with respect thereto (R. 34), and a warrant for satisfaction of the final decree was executed by his counsel (R. 37). On January 10, 1922, an order satisfying the decree was entered in the District Court (R. 39).

Under date of March 20, 1924, over two and a half years after the entry of the final decree in the case and over two years after the entry of the order satisfying the decree, the plaintiff served notice upon the Alien Property Custodian and the Treasurer (R. 10) that a motion would be made for an order naming a master to take and state the account of the defendants for income or interest, if any, earned on the proceeds of the sale of the stock covered by the final decree; vacating and setting aside so much of the order satisfying the decree and warrant for satisfaction upon which it was entered as purported to satisfy the decree with reference to the defendants' duty to account for the

income or interest, if any, earned or accrued; and vacating and setting aside so much of the receipt of the plaintiff as released or purported to release the Alien Property Custodian and the Treasurer from liability to account for income or interest.

The plaintiff contended in the District Court that interest had been earned by the Custodian upon the principal amount recovered by the plaintiff, which interest he was entitled to receive; that the receipts and releases and the warrant for satisfaction of the decree had been secured from the plaintiff by duress in that payment of the principal sum had been refused unless a complete receipt and release was executed. As to whether or not interest had been earned it appeared that the proceeds of the sale of the plaintiff's stock had been deposited in the Treasury of the United States by the Alien Property Custodian, pursuant to the provisions of Section 12 of the Trading with the Enemy Act (c. 106, 40 Stat. 423), together with a large amount of other enemy owned money (R. 19, 40, 41) a portion of which aggregate sum had been invested by the Secretary of the Treasury pursuant to Section 12, supra, in interest-bearing Government securities.

It was the contention of the plaintiff that he was entitled to recover a portion of the interest accrued upon the said securities. The District Court denied plaintiff's motion on the ground that the final decree of July 6, 1921, was interlocutory and that under that decree plaintiff was not immediately entitled to the payment of the sum for which

he gave the receipt, and was therefore not unlawfully kept out of his money, the statute giving him the option, and only that, to take what defendants would agree to give in final settlement, or to prosecute the account to final decree. (R. 51, 54.)

On appeal from the order of the District Court the Circuit Court of Appeals (R. 65) passed over all questions of duress and went immediately to the question as to whether or not plaintiff would be entitled to recover any of the interest even assuming the proceedings were reopened. The Circuit Court of Appeals held that the plaintiff was not entitled to receive any interest and, therefore, affirmed the decree of the District Court.

The defendants do not press as a defense the fact that the plaintiff executed a complete receipt and release at the time the principal amount involved was paid to him, or the fact that an order satisfying the final decree was entered. It is desirable to have the question of law as to the right to recover the interest in such a case as this decided for their guidance in similar cases.

THE QUESTION INVOLVED

The question involved in this case is whether or not a citizen of the United States, whose property has been mistakenly seized by the Alien Property Custodian, sold, and the proceeds of the sale deposited in the Treasury of the United States pursuant to Section 12 of the Trading with the Enemy Act, with enemy money, some of which is invested

in Government securities by the Secretary of the Treasury, is entitled to recover in a suit under Section 9 any of the interest accrued upon the said securities.

There is no question involved in this case of the right of a claimant under Section 9 of the Trading with the Enemy Act to receive all income derived from his property while in the custody of the Alien Property Custodian. The defendants concede and have never disputed the right of a proper claimant under Section 9 of the Trading with the Enemy Act to recover all income earned on his property while in the custody of the Government other than the interest accumulated on Government securities in which the Secretary of the Treasury has invested cash deposited in the Treasury of the United States pursuant to Section 12 of the Trading with the Enemy Act. The question here is whether interest that is payable by the United States is recoverable.

SUMMARY OF ARGUMENT

Section 12 of the Trading with the Enemy Act requires the Alien Property Custodian to pay all cash into the Treasury of the United States. The Secretary of the Treasury is given the discretionary power of investing such cash in Government securities. A portion of the cash thus deposited in the Treasury of the United States, of which aggregate amount cash belonging to the appellant formed a part, was invested in interest bearing

Government securities. The appellant, who was entitled as an American citizen to recover his principal which has been paid him is not entitled to recover any of the interest thus accumulated, because such a payment to him would constitute the payment of interest by the United States upon one of its obligations when there is no statutory authorization for such payment.

The statute allows recovery only of the net proceeds of sale of seized property, without interest.

The fact that the proceeds of the sale of appellant's property was invested in interest-bearing Government securities does not change the situation, since the payment of the interest on the securities to the appellant would constitute an indirect payment of interest by the United States upon its obligation. *United States ex rel Angarica* v. *Bayard*, 127 U. S. 251.

There was no taking for public use under the power of eminent domain and the rule in such cases requiring payment of interest from the date of the taking to the date of payment of compensation is not applicable.

ARGUMENT

IN THE ABSENCE OF STATUTE NO INTEREST CAN BE RECOVERED UPON AN OBLIGATION OF THE UNITED STATES

The plaintiff's property was seized by the Alien Property Custodian pursuant to the terms of Subsection (c) of Section 7 of the Trading with the

Enemy Act, which is as follows (c. 106, 40 Stat. 418):

> If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian.

Plaintiff's property was sold by the Alien Property Custodian pursuant to the provisions of Section 12 of the Trading with the Enemy Act as amended March 28, 1918 (c. 28, 40 Stat. 460), which provides:

> The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or be-

> come appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof; *Provided*, That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further*, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct.

The funds realized from the sale of the plaintiff's property the Custodian was required by Section 12 of the Trading with the Enemy Act to deposit in the Treasury of the United States (c. 106, 40 Stat. 423). This Section provides as follows:

> That all moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regula-

> tions as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the *war as the President shall deem practic*able, such securities shall be sold and the proceeds deposited in the Treasury.

As will appear from these statutes the Alien Property Custodian is not the custodian of any money which may come into his possession either upon demand by him or as the result of the sale of property under the Act, after it is deposited in the Treasury. Money must be paid into the Treasury of the United States. The fact that the Alien Property Custodian is not the custodian of money is emphasized by the fact that Section 9 of the Act as amended June 5, 1920 (c. 241, 41 Stat. 978), under which this suit is brought, provides that "the Alien Property Custodian *or* the Treasurer of the United States, as the case may be, shall be made a party defendant." This clearly shows that Congress had in mind that the Alien Property Custodian was to be the custodian of property, whereas money was to be deposited in the Treasury of the United States, and the Alien Property Custodian was to have no control whatsoever over it. In order for money to be secured by a claimant the Treasurer must be a party to the suit in order that the decree as to money may run against him.

The money which represented the proceeds of the sale of plaintiff's property was deposited in the Treasury of the United States and became inter-

mingled with enemy money which had been so deposited. (R. 19, 40, 41.) By Section 12, supra, the Secretary of the Treasury is given permission (he is not required so to do) to invest and reinvest the money paid into the Treasury of the United States.

Exercising the authority conferred upon him the Secretary of the Treasury invested some of the funds, not all of them, of which the money representing the sale of the plaintiff's property was a part, in interest bearing Government securities. Plaintiff insists that he is entitled to recover a portion of such interest. Section 7–c as amended November 4, 1918 (c. 201, 40 Stat. 1021), provides:

> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and *in the event of sale or other disposition* of such property by the Alien Property Custodian, shall be limited to and enforced against *the net proceeds received therefrom* and held by the Alien Property Custodian or by the Treasurer of the United States. (Italics ours.)

It will, therefore, appear that the plaintiff's right to recover is in any event limited to the net proceeds of the sale, which do not include interest upon such proceeds.

More important, however, is the fact that to permit the recovery by plaintiff of any portion of the interest accumulated upon the securities in which general enemy funds had been invested will mean the payment of interest by the United States. The Trading with the Enemy Act makes no provision for the payment to claimants of interest upon funds which have been wrongfully or mistakenly seized.

It has been the law for many years that the United States, in the absence of statute, can not be compelled to pay interest upon its obligations. In the case of *United States* v. *Rogers*, 255 U. S. 163, 169, this Court said:

> It is unquestionably true that the United States upon claims made against it, can not, in the absence of a statute to that end, be subjected to the payment of interest. *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *North Carolina*, 136 U. S. 211, 216, cited and approved in *National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496. In the present case the landowners did not sue upon a claim against the Government, as was the fact in *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330.

This principle is dealt with more at length in the case of *United States* v. *North American Company*, 253 U. S. 330, 336, where this Court said:

Congress, in thus denying to the court power to award interest, adopted the common-law rule that delay or default in payment (upon which, in the absence of express agreement, the right to recover interest rests), can not be attributed to the sovereign. *United States* v. *North Carolina,* 136 U. S. 211, 216. That rule had theretofore been uniformly applied in our executive departments except where statutes provided otherwise. *United States* v. *Sherman,* 98 U. S. 565, 567–568. So rigorously is the rule applied, that, in the adjustment of mutual claims between an individual and the Government, the latter has been held entitled to interest on its credits although relieved from the payment of interest on the charges against it. *United States* v. *Verdier,* 164 U. S. 213, 218–219. This denial of interest, like the refusal to tax costs against the United States in favor of the prevailing party, *Stanley* v. *Schwalby,* 162 U. S. 255, 272; *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 296, and the refusal to hold the United States liable for torts committed by its officers and agents in the ordinary course of business, *Crozier* v. *Krupp,* 224 U. S. 290, are hardships from which, with rare exceptions, *William Cramp & Sons Co.* v. *Curtis Turbine Co.,* 246 U. S. 28, 40–41, Congress has been unwilling to relieve those who either voluntarily deal with the Government or are otherwise affected by its acts.

It is clear that had the Treasury of the United States held the deposited funds invested there would be no obligation to pay interest. The fact that acting under statutory authority the Secretary of the Treasury invested the funds in obligations of the United States Government does not alter the situation, for it is the United States Government which would be called upon to pay the interest upon the securities. The real effect of the statutory authority given was to authorize the Treasury to make use of the moneys deposited with it under the provisions of the Trading with the Enemy Act, a war measure.

That interest will not be paid by the United States in such an indirect way is clearly demonstrated by the case of *United States ex rel. Angarica* v. *Bayard,* 127 U. S. 251, and it is submitted that the decision in that case clearly disposes of the plaintiff's case. In that case a petition for a writ of mandamus was presented to the Supreme Court of the District of Columbia by the relator. The Supreme Court of the District of Columbia dismissed the petition and from the judgment of dismissal an appeal was taken. The facts of the case were that on February 12, 1871, an agreement was concluded between the United States and Spain for the settlement of certain claims of the United States. Pursuant to the agreement arbitrators and an umpire were appointed, and a commission thus composed was established. The relator had filed

a claim before the commission, and the commission had decided that the relator was entitled to approximately $750,000 with interest thereon at 6% per annum from November 1, 1875, to the date of payment. The amount of the award to the relator had been paid to the Secretary of State of the United States and the Secretary of State had paid over to the relator the entire amount, except approximately $41,000. The $41,000 was 5% of the amount received and was retained by the Secretary until the Government of Spain should make provision for paying the expenses of the commission. The money was retained by the Secretary of State until payment to cover the expenses of the commission had been made by Spain in conformity with the provisions of the agreement of February 12, 1871, between the United States and Spain.

The money thus retained by the Secretary of State was invested in Government securities. Later Spain made provision for the expenses, and the Secretary of State paid to the relator the $41,000, which he had retained but did not pay any interest or income which had been earned by reason of the investment of the $41,000 in Government securities. The money while with the Secretary of State had been invested pursuant to Section 2 of the Act of September 11, 1841 (c. 25, 5 Stat. 465), which prescribed that " all funds held in trust by the United States, and the annual interest accruing

thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum." (The similarity between this provision and the provision in the Trading with the Enemy Act as to investment must be noted.) It was to compel the Secretary of State to pay over the interest accrued on the fund of $41,000 that the petition for a writ of mandamus was filed in the Supreme Court of the District of Columbia in the case.

The Court held, in the first place, that if there was any unlawful withholding from the petitioner the money was withheld by the Government of the United States acting through the Secretary of State, and any claim of the petitioner based upon an unlawful withholding was *a claim against the Government of the United States.* Continuing, the Court said (p. 259):

> That claim, in the present controversy, assumes the shape of a claim for the increment or income alleged to have been actually received by the United States from the investment of the money for the time it was withheld; *but the claim in that respect is not different in character from what it would have been if, instead of being a claim for increment or income actually received by the United States, it were a claim for interest generally, or for increment or income which the United States would or might have received by the exercise of proper care in the investment of the money.*

The case, therefore, falls within the well-settled principle, that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the Government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages.

This appears from a succession of the opinions of the Attorneys General of the United States, given by Attorneys General Wirt, Crittenden, Legare, Nelson, Johnson, Cushing and Black, and appearing in the following volumes and pages of those opinions, as published: 1, 268; 1, 550; 1, 554; 3, 635; 4, 14; 4, 136; 4, 286; 5, 105; 7, 523; 9, 57; and 9, 449.

Not only is this the general principle and settled rule of the executive department of the government, but it has been the rule of the legislative department, because Congress, though well knowing the rule observed at the Treasury, and frequently invited to change it, has refused to pass any general law for the allowance and payment

of interest on claims against the Government. Such statutes for the payment of interest as have been passed, apply to specific cases enumerated in the several statutes, and do not cover the present case.

The principle above stated is recognized by this court. In *Tillson* v. *United States,* 100 U. S. 43, 47, this court, speaking of the rule that interest is recoverable between citizens if a payment of money is unreasonably delayed, says that with the Government the rule is different, and that the practice has long prevailed in the departments of not allowing interest on claims presented, except it is in some way specially provided for. See also *Gordon* v. *United States,* 7 Wall. 188, and *Harvey* v. *United States,* 113 U. S. 243, 248, 249.

No claim for the allowance of interest can be predicated in this case upon the language of any notification or circular or letter which issued from the Department of State. No binding contract for the payment of interest was thereby created, and the present Secretary was at liberty to act on his own judgment in the premises, irrespective of anything contained in any such notification, circular, or letter. (Italics supplied.)

It is submitted that, assuming the most favorable state of facts in the present case to the plaintiff, the *Angarica case* completely disposes of the present case in favor of the defendants. An effort is made on page 37 of plaintiff's brief to distinguish the *An-*

garica case. The plaintiff says that the claim in that case was predicated upon an alleged withholding of money recovered from the Spanish Government by the United States acting in behalf of its citizens under a treaty, and that the claim was originally and truly against the foreign Government in the collection of which the United States offered a helping hand. In the first place, no distinction can be made because of the fact that the United States in the present case came into the money of the plaintiff's deceased by a wrongful seizure and withheld the same and the fact that the money in the *Angarica case* was simply wrongfully withheld.

Furthermore, the contention of the plaintiff that the claim in the *Angarica case* was a claim against a foreign Government is unsound. After the money was collected by the United States there was no claim against a foreign government, and the Court held that the claim was against the United States for wrongful witholding. It is respectfully submitted that there is no distinction upon principle whatsoever between the present case and the case of *Angarica* v. *Bayard*.

The principal contention of the plaintiff that the United States should pay interest upon the claim here is founded upon the analogy of condemnation proceedings by the United States, and on the claim that, in condemnation proceedings, interest is awarded from the time of the taking to the time of payment as a part of just compensation for the tak-

ing of a citizen's property. It is further asserted that unless interest is paid by the United States upon the present claim the Fifth Amendment of the Constitution is being violated in that just compensation for the taking is not being fully made. This argument is manifestly fallacious. The United States did not take the property of the plaintiff under any theory of condemnation. It was taken as a war measure under the mistaken belief that it was the property of an enemy. The taking by the United States was under a claim of right, adverse to the owner, and tortious. If a statute is not present to permit the taking in condemnation proceedings by the United States the act of taking becomes merely a trespass by the individual who assumed to act for the United States. *United States* v. *Lee,* 106 U. S. 196. This is also brought out in the case of *United States* v. *North American Co.,* 253 U. S. 330.

The United States, it is true, has had the use of appellant's money, and there may be a moral obligation to pay for that use, but so there is in any case where the United States owes money and does not pay it promptly. The remedy in such cases is with Congress, not in the courts, and until Congress authorizes the payment of interest the courts can not award it.

Upon the general point as to the right to recover interest from the United States see also *United States* v. *Sherman,* 98 U. S. 565; *United States* v. *Verdier,* 164 U. S. 213; and *United States* v. *North Carolina,* 136 U. S. 211.

CONCLUSION

It appears, therefore, from the foregoing that the plaintiff is not entitled to recover any of the interest accrued upon Government securities in which money paid into the Treasury of the United States under the Trading with the Enemy Act is invested.

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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APRIL, 1926.

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